

1 SHEPPARD MULLIN RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
GUY N. HALGREN, Cal. Bar No. 115732
3 SAMANTHA D. HARDY, Cal. Bar No. 199125
RACHEL A. MILLER, Cal. Bar. No. 247023
4 501 West Broadway, 19th Floor
San Diego, California 92101-3598
5 Telephone: 619-338-6500
Facsimile: 619-234-3815
6 ghalgren@sheppardmullin.com
shardy@sheppardmullin.com
7 rmiller@sheppardmullin.com

8 Attorneys for Defendants
FRITO-LAY, INC. and ROLLING
9 FRITO-LAY SALES, LP

10
11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13

14 EDWARD DE STEFAN, individually and
15 on behalf of other members of the public
similarly situated,

16 Plaintiff,

17
18 v.

19 FRITO LAY, INC., ROLLING FRITO-
LAY SALES, LP, and DOES 1-10,
20 inclusive,

21 Defendants.
22
23
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25
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27
28

Case No. SA CV10-0112-DOC (MLGx)

**DEFENDANTS FRITO-LAY, INC.'S
AND ROLLING FRITO-LAY SALES,
LP'S ANSWER TO PLAINTIFF'S
SECOND AMENDED COMPLAINT**

Judge: Hon. David O. Carter
Ctm: 9-D

[Second Amended Complaint filed
September 30, 2010]

1 Defendants Frito-Lay, Inc. ("Frito-Lay") and Rolling Frito-Lay Sales, LP
2 ("RFLS") (collectively referred to as "Defendants"), by and through their undersigned
3 counsel, answer Plaintiff's Second Amended Complaint ("SAC") as follows:
4

5 **JURISDICTION AND VENUE**
6

7 1. Answering paragraph 1, Defendants admit this action was originally
8 filed in the Superior Court of the State of California, County of San Diego, Case No. 37-
9 2009-00102269-CU-OE-CTL.
10

11 2. Answering paragraph 2, Defendants admit Frito-Lay removed this
12 action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332 on or around December
13 14, 2009. Defendants admit this Court appears to have subject matter jurisdiction over this
14 matter.
15

16 **PARTIES**
17

18 3. Answering paragraph 3, Defendants admit that, to the best of their
19 knowledge, Plaintiff Edward De Stefan is, and at all relevant times was, a resident of San
20 Diego County, California.
21

22 4. Answering paragraph 4, Frito-Lay admits it is a corporation organized
23 and existing under the laws of Delaware. Frito-Lay admits that, at all relevant times, it has
24 been licensed and qualified to do business in California. Frito-Lay admits that, at all
25 relevant times, it transacted business in California. Frito-Lay admits that, at all relevant
26 times, it was an employer and had employees throughout San Diego county, the state of
27 California, and the United States of America.
28

1 5. Answering paragraph 5, RFLS admits it is a limited partnership
2 organized and existing under the laws of Delaware. RFLS admits that, at all relevant
3 times, it has been licensed and qualified to do business in California. RFLS admits that, at
4 all relevant times, it transacted business in California. RFLS admits that, at all relevant
5 times, it was an employer and had employees throughout San Diego county, the state of
6 California, and the United States of America.

7
8 6. Answering paragraph 6, no allegations are contained in this paragraph
9 that require a response. To the extent a response is required, Defendants deny the
10 allegations in this paragraph.

11
12 7. Answering paragraph 7, no allegations are contained in this paragraph
13 that require a response. To the extent a response is required, Defendants deny the
14 allegations in this paragraph.

15
16 8. Answering paragraph 8, Defendants deny the allegations in this
17 paragraph because the Doe Defendants are unidentified.

18
19 9. Answering paragraph 9, Defendants deny the allegations in this
20 paragraph because the Doe Defendants are unidentified.

21
22 **CLASS ACTION ALLEGATIONS**
23

24 10. Answering paragraph 10, Defendants admit that Plaintiff purports to
25 bring this action on behalf of himself and as a representative of a class as defined in Rule
26 23 of the Federal Rules of Civil Procedure. Defendants deny, however, that this matter is
27 appropriate for class treatment under Rule 23 of the Federal Rules of Civil Procedure.
28

1 11. Answering paragraph 11, Defendants admit that Plaintiff purports to
2 assert claims arising under California law. Defendants, however, deny that Plaintiff is
3 entitled to any relief under California law.

4
5 12. Answering paragraph 12, Defendants admit that Plaintiff purports to
6 represent a class and two subclasses of individuals as defined in paragraph 12 and referred
7 to in the SAC as "class members," "waiting time subclass members," and "paystub
8 subclass members." Defendants deny that Plaintiff has sufficiently defined the putative
9 class and putative subclasses. Defendants further deny that Plaintiff, the putative class
10 members, and putative subclass members are similarly situated and, on that basis, deny any
11 remaining allegations contained in this paragraph.

12
13 13. Answering paragraph 13, Defendants deny that the members of the
14 class are so numerous as to make it impracticable to bring them all before the Court.
15 Defendants admit that the putative class may consist of more than 2,000 members, but
16 denies that this matter is appropriate for class certification under Rule 23 of the Federal
17 Rules of Civil Procedure. Defendants deny any remaining allegations contained in this
18 paragraph.

19
20 14. Answering paragraph 14, Defendants deny each and every allegation
21 contained in this paragraph.

22
23 15. Answering paragraph 15, Defendants deny each and every allegation
24 contained in this paragraph.

25
26 16. Answering paragraph 16 and its subparts (a) and (b), Defendants deny
27 each and every allegation contained in this paragraph.

1 17. Answering paragraph 17, Defendants deny each and every allegation
2 contained in this paragraph.

3
4 18. Answering paragraph 18, Defendants deny each and every allegation
5 contained in this paragraph.

6
7 19. Answering paragraph 19 and its subparts (a) through (k), Defendants
8 deny each and every allegation contained in this paragraph.

9
10 **FACTUAL ALLEGATIONS**
11

12 20. Answering paragraph 20, Defendants admit they currently employ,
13 and employed throughout the relevant time period, Route Sales Representatives in
14 California. Defendants deny that different RSR positions are similar to one another.

15
16 21. Answering paragraph 21, Defendants admits that, to the best of its
17 knowledge, they employed Plaintiff as a Route Sales Representative throughout the
18 relevant time period up until on or about August 10, 2009. Frito-Lay admits that, during
19 the relevant time period, Plaintiff worked out of the San Diego Mega Distribution Center
20 located in San Diego, California.

21
22 22. Answering paragraph 22, Defendants admit they currently employ,
23 and employed throughout the relevant time period, Route Sales Representatives in
24 California.

1 23. Answering paragraph 23, Defendants can neither confirm nor deny
2 the allegations set forth in this paragraph, because it is unclear which positions are
3 included within the term "Class Member".
4

5 24. Answering paragraph 24, Defendants can neither confirm nor deny
6 that they paid commissions to all putative class members, because it is unclear which
7 positions are included within the term "Class Member". Defendants admit that
8 commissions constitute wages under California law.
9

10 25. Answering paragraph 25, Defendants deny each and every allegation
11 contained in this paragraph.
12

13 26. Answering paragraph 26, Defendants deny each and every allegation
14 contained in this paragraph.
15

16 27. Answering paragraph 27, Defendants deny each and every allegation
17 contained in this paragraph.
18

19 28. Answering paragraph 28, Defendants deny the allegations contained
20 in this paragraph on the basis that any communication between Defendants and their
21 attorneys is subject to the attorney-client privilege.
22

23 29. Answering paragraph 29, Defendants deny each and every allegation
24 contained in this paragraph.
25

26 30. Answering paragraph 30, Defendants deny each and every allegation
27 contained in this paragraph.
28

1 31. Answering paragraph 31, Defendants deny each and every allegation
2 contained in this paragraph

3
4 **FIRST CAUSE OF ACTION FOR FAILURE TO PAY OVERTIME WAGES**

5
6 32. Answering paragraph 32, Defendants incorporate herein by reference
7 its responses to paragraphs 1 through 31 inclusive, as though fully set forth herein.

8
9 33. Answering paragraph 33, no allegations are contained in this
10 paragraph that require a response because the paragraph contains a recitation of the law.
11 To the extent a response is required, Defendants deny the allegations in this paragraph

12
13 34. Answering paragraph 34, no allegations are contained in this
14 paragraph that require a response because the paragraph contains a recitation of the law.
15 To the extent a response is required, Defendants deny the allegations in this paragraph.

16
17 35. Answering paragraph 35, Defendants admit that Plaintiff and putative
18 class members in some weeks may have worked in excess of eight (8) hours in a day
19 and/or forty (40) hours in a week.

20
21 36. Answering paragraph 36, Defendants deny each and every allegation
22 contained in this paragraph.

23
24 37. Answering paragraph 37, Defendants deny each and every allegation
25 contained in this paragraph.

1 38. Answering paragraph 38, Defendants deny each and every allegation
2 contained in this paragraph.

3
4 39. Answering paragraph 39, Defendants deny each and every allegation
5 contained in this paragraph.

6
7 40. Answering paragraph 40, Defendants deny each and every allegation
8 contained in this paragraph.

9
10 **SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT**

11
12 41. Answering paragraph 41, Frito-Lay incorporates herein by reference
13 its responses to paragraphs 1 through 40 inclusive, as though fully set forth herein.

14
15 42. Answering paragraph 42, Defendants deny each and every allegation
16 contained in this paragraph.

17
18 43. Answering paragraph 43, Defendants deny each and every allegation
19 contained in this paragraph.

20
21 44. Answering paragraph 44, Defendants deny each and every allegation
22 contained in this paragraph.

23
24 45. Answering paragraph 45, Defendants deny each and every allegation
25 contained in this paragraph.

1 46. Answering paragraph 46, Defendants deny each and every allegation
2 contained in this paragraph.

3
4 47. Answering paragraph 47, Defendants deny each and every allegation
5 contained in this paragraph.

6
7 48. Answering paragraph 48, Defendants deny each and every allegation
8 contained in this paragraph.

9
10 49. Answering paragraph 49, Defendants deny each and every allegation
11 contained in this paragraph.

12
13 **THIRD CAUSE OF ACTION FOR VIOLATION OF**
14 **CALIFORNIA LABOR CODE § 221**

15
16 50. Answering paragraph 50, Frito-Lay incorporates herein by reference
17 its responses to paragraphs 1 through 49 inclusive, as though fully set forth herein.

18
19 51. Answering paragraph 51, no allegations are contained in this
20 paragraph that require a response because the paragraph contains a recitation of the law.
21 To the extent a response is required, Defendants deny the allegations in this paragraph.

22
23 52. Answering paragraph 52, Defendants deny each and every allegation
24 contained in this paragraph.

25
26 53. Answering paragraph 53, Defendants deny each and every allegation
27 contained in this paragraph.

1 **FOURTH CAUSE OF ACTION FOR FAILURE TO PAY WAGES DUE**

2
3 54. Answering paragraph 54, Frito-Lay incorporates herein by reference
4 its responses to paragraphs 1 through 53 inclusive, as though fully set forth herein.

5
6 55. Answering paragraph 55, no allegations are contained in this
7 paragraph that require a response because the paragraph contains a recitation of the law.
8 To the extent a response is required, Defendants deny the allegations in this paragraph.

9
10 56. Answering paragraph 56, Defendants deny each and every allegation
11 contained in this paragraph.

12
13 57. Answering paragraph 57, Defendants deny each and every allegation
14 contained in this paragraph.

15
16 58. Answering paragraph 58, Defendants deny each and every allegation
17 contained in this paragraph.

18
19 **FIFTH CAUSE OF ACTION FOR FAILURE TO PROVIDE ITEMIZED WAGE**
20 **STATEMENTS**

21
22 59. Answering paragraph 59, Frito-Lay incorporates herein by reference
23 its responses to paragraphs 1 through 58 inclusive, as though fully set forth herein.

24
25 60. Answering paragraph 60, no allegations are contained in this
26 paragraph that require a response because the paragraph contains a recitation of the law.
27 To the extent a response is required, Defendants deny the allegations in this paragraph.

1 61. Answering paragraph 61, Defendants deny each and every allegation
2 contained in this paragraph.

3
4 62. Answering paragraph 62, Defendants deny each and every allegation
5 contained in this paragraph.

6
7 63. Answering paragraph 63, Defendants deny each and every allegation
8 contained in this paragraph.

9
10 **SIXTH CAUSE OF ACTION FOR UNFAIR COMPETITION**

11
12 64. Answering paragraph 64, Frito-Lay incorporates herein by reference
13 its responses to paragraphs 1 through 63 inclusive, as though fully set forth herein.

14
15 65. Answering paragraph 65, Defendants deny each and every allegation
16 contained in this paragraph.

17
18 66. Answering paragraph 66, Defendants deny each and every allegation
19 contained in this paragraph.

20
21 67. Answering paragraph 67, no allegations are contained in this
22 paragraph that require a response because the paragraph contains a recitation of the law.
23 To the extent a response is required, Defendants deny the allegations in this paragraph.

24
25 68. Answering paragraph 68, Defendants deny each and every allegation
26 contained in this paragraph.

1 69. Answering paragraph 69, Defendants deny each and every allegation
2 contained in this paragraph.

3
4 70. Answering paragraph 70, Defendants deny each and every allegation
5 contained in this paragraph.

6
7 **SEVENTH CAUSE OF ACTION FOR VIOLATION OF THE CALIFORNIA**
8 **LABOR CODE PRIVATE ATTORNEY GENERAL ACT OF 2004**
9

10 71. Answering paragraph 71, Frito-Lay incorporates herein by reference
11 its responses to paragraphs 1 through 70 inclusive, as though fully set forth herein.

12
13 72. Answering paragraph 72, Defendants deny each and every allegation
14 contained in this paragraph.

15
16 73. Answering paragraph 73, Defendants deny each and every allegation
17 contained in this paragraph.

18
19 74. Answering paragraph 74, no allegations are contained in this
20 paragraph that require a response because the paragraph contains a recitation of the law.
21 To the extent a response is required, Defendants deny the allegations in this paragraph.

22
23 75. Answering paragraph 75, Defendants deny each and every allegation
24 contained in this paragraph.

1 76. Answering paragraph 76, Defendants admit that Plaintiff purports to
2 have complied with PAGA notice provisions as set forth in California Labor Code
3 § 2699.3(a)(1). Whether Plaintiff complied with PAGA notice provisions is a question of
4 law for which no response is required. To the extent a response is required, Defendants
5 deny the allegations in this paragraph.

6
7 77. Answering paragraph 77, no allegations are contained in this
8 paragraph that require a response because the paragraph contains a recitation of the law.
9 To the extent a response is required, Defendants deny the allegations in this paragraph.

10
11 78. Answering paragraph 78, Defendants admit that, at all relevant times,
12 they have employed one or more employees. Defendants deny they have violated any law
13 subjecting them to civil penalties under California Labor Code § 2699(f).

14
15 79. Answering paragraph 79, Defendants deny each and every allegation
16 contained in this paragraph.

17
18 **AFFIRMATIVE DEFENSES**

19
20 **FIRST AFFIRMATIVE DEFENSE**

21 **(Failure to State a Cause of Action)**

22
23 Neither the SAC, nor any purported cause of action alleged therein, states
24 facts sufficient to constitute a cause of action upon which relief can be granted against
25 Defendants.

1 **SECOND AFFIRMATIVE DEFENSE**

2 **(Statutes of Limitations)**

3
4 The SAC and each purported cause of action alleged therein are barred, in
5 whole or in part, by the applicable statutes of limitations.

6
7 **THIRD AFFIRMATIVE DEFENSE**

8 **(Laches)**

9
10 The SAC and each purported cause of action alleged therein are barred, in
11 whole or in part, by the equitable doctrine of laches.

12
13 **FOURTH AFFIRMATIVE DEFENSE**

14 **(Estoppel)**

15
16 Plaintiff is estopped by his conduct from asserting the causes of action upon
17 which he seeks relief.

18
19 **FIFTH AFFIRMATIVE DEFENSE**

20 **(Waiver)**

21
22 The SAC and each purported cause of action alleged therein are barred, in
23 whole or in part, because Plaintiff has voluntarily and knowingly waived and released each
24 and all of his rights and causes of action against Defendants.

1 **SIXTH AFFIRMATIVE DEFENSE**

2 **(Unclean Hands)**

3
4 Plaintiff has or had unclean hands with respect to the matters alleged in the
5 SAC and is therefore barred from recovering any relief on the SAC or any purported cause
6 of action alleged therein.

7
8 **SEVENTH AFFIRMATIVE DEFENSE**

9 **(Consent)**

10
11 The SAC and each purported cause of action alleged therein are barred, in
12 whole or in part, because Plaintiff consented to the conduct about which he now
13 complains.

14
15 **EIGHTH AFFIRMATIVE DEFENSE**

16 **(Misrepresentations)**

17
18 Defendants are informed and believe, and on that basis allege, that Plaintiff's
19 causes of action are barred, in whole or in part, by misrepresentations made by Plaintiff.

20
21 **NINTH AFFIRMATIVE DEFENSE**

22 **(No Willful Failure to Pay)**

23
24 Plaintiff cannot recover waiting time penalties because any alleged failure to
25 pay wages was based on a good faith dispute regarding the applicable law or facts.

1 **TENTH AFFIRMATIVE DEFENSE**

2 **(No Loss/Unjust Enrichment)**

3
4 Plaintiff has not suffered any losses and Defendants have not been unjustly
5 enriched as a result of any action or inaction of Defendants or its agents. Plaintiff is
6 therefore not entitled to any disgorgement or restitution.

7
8 **ELEVENTH AFFIRMATIVE DEFENSE**

9 **(Failure to Mitigate)**

10
11 Plaintiff has failed to mitigate his losses, if any, and as a result of such
12 failure, any award must be reduced, excused, and/or discharged.

13
14 **TWELFTH AFFIRMATIVE DEFENSE**

15 **(Lack of Specificity)**

16
17 Plaintiff's claim of unfair business practices in violation of California
18 Business and Professions Code §§ 17200, et seq., is barred because it fails to plead specific
19 facts capable of stating a claim for unfair business practice.

20
21 **THIRTEENTH AFFIRMATIVE DEFENSE**

22 **(Justification And Privilege)**

23
24 Defendants cannot be liable for any alleged violation of California Business
25 and Professions Code §§ 17200, et seq. because their actions, conduct and dealings with
26 their employees were lawful, and were carried out in good faith and for legitimate business
27 purposes.

1 **FOURTEENTH AFFIRMATIVE DEFENSE**

2 **(Plaintiff Not Competent)**

3
4 Some or all of Plaintiff's causes of action fail, in whole or in part, because
5 Plaintiff is not competent to bring the claims on behalf of other parties.

6
7 **FIFTEENTH AFFIRMATIVE DEFENSE**

8 **(Non-Certifiable Class)**

9
10 The SAC does not state facts sufficient to certify a class pursuant to Rule 23
11 of the Federal Rules of Civil Procedure and, accordingly, this action is not properly
12 brought as a class action.

13
14 **SIXTEENTH AFFIRMATIVE DEFENSE**

15 **(No Common Issues)**

16
17 There is a lack of common issues of facts and law and, accordingly, this
18 action is not properly brought as a class action.

19
20 **SEVENTEENTH AFFIRMATIVE DEFENSE**

21 **(Lack of Typicality)**

22
23 Plaintiff's claims are not typical of the class he purports to represent and,
24 accordingly, this action is not properly brought as a class action.

1 **EIGHTEENTH AFFIRMATIVE DEFENSE**

2 **(Inadequacy of Class Representative)**

3
4 Defendants are informed and believe and based upon such information and
5 belief allege that Plaintiff is not a proper representative of the class he purports to represent
6 and, accordingly, this action is not properly brought as a class action.
7

8 **NINETEENTH AFFIRMATIVE DEFENSE**

9 **(Lack of Superiority)**

10
11 The class action procedure is not the superior method for adjudicating
12 Plaintiff's claims or the claims of the alleged class and, accordingly, this action is not
13 properly brought as a class action.
14

15 **TWENTIETH AFFIRMATIVE DEFENSE**

16 **(Lack of Standing)**

17
18 The SAC and each purported cause of action alleged therein are barred, in
19 whole or in part, because Plaintiff lacks standing to assert any purported cause of action
20 against Defendants.
21

22 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

23 **(Res Judicata)**

24
25 The SAC and each purported cause of action alleged therein are barred, in
26 whole or in part, by the doctrine of res judicata.
27
28

1 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

2 **(Collateral Estoppel)**

3
4 The SAC and each purported cause of action alleged therein are barred, in
5 whole or in part, by the doctrine of collateral estoppel.

6
7 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

8 **(Release)**

9
10 The SAC and each purported cause of action alleged therein are barred, in
11 whole or in part, because Plaintiff and/or the persons he purports to represent released
12 Defendants from the claims stated in the SAC.

13
14 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

15 **(Accord and Satisfaction)**

16
17 The SAC and each purported cause of action alleged therein are barred, in
18 whole or in part, by the doctrine of accord and satisfaction.

19
20 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

21 **(After-Acquired Evidence)**

22
23 The SAC and each purported cause of action alleged therein are barred, in
24 whole or in part, by the doctrine of after-acquired evidence.

1 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

2 **(Full Performance)**

3
4 Plaintiff is not entitled to any relief because Defendants have performed all
5 statutory, contractual, and other obligations.
6

7 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

8 **(Comparative Fault)**

9
10 Plaintiff, and persons and entities other than Defendants, have acted in bad
11 faith with respect to the matters alleged in the SAC and are otherwise at fault. By reason
12 of Plaintiff's bad faith and comparative fault, Plaintiff's right of recovery from Defendants,
13 if any, should be reduced by the amount which the negligence, bad faith and/or fault of
14 persons and/or entities other than Defendants, including Plaintiff, contributed to any
15 damages.
16

17 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

18 **(Setoff/Offset/Recoupment)**

19
20 Some or all of the purported causes of action in the SAC are subject to setoff,
21 offset and/or recoupment.
22
23
24
25
26
27
28

1 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

2 **(Exemptions and Exclusions from State Law)**

3
4 Some or all of Plaintiff's causes of action are barred by state law because
5 Plaintiff and the putative class were exempt employees, including but not limited to the
6 motor carrier exemption and/or the outside sales exemption.
7

8 **THIRTIETH AFFIRMATIVE DEFENSE**

9 **(Failure to Exhaust Administrative Remedies)**

10
11 Plaintiff has failed to adequately pursue administrative remedies with the
12 California Division of Labor Standards Enforcement. Plaintiff should be ordered to pursue
13 administrative remedies with the California Division of Labor Standards Enforcement,
14 which has primary jurisdiction over Plaintiff's claims, as is required pursuant to Labor
15 Code §§ 2699, *et seq.*
16

17 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

18 **(No Predicate Violation of Law)**

19
20 Plaintiff cannot establish a predicate violation of law by Defendants
21 sufficient to maintain a cause of action pursuant to Business and Professions Code
22 §§ 17200, *et seq.* and Labor Code § 2699. Further, Plaintiff's claims for Violation of
23 Business and Professions Code §§ 17200, *et seq.*, and Labor Code § 2699 are barred to the
24 extent they are based upon the purported violation of a statute or regulation that is of
25 purely regulatory import, or otherwise does not define "unlawful" conduct.
26
27
28

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Improper Delegation of Powers)

To the extent that Plaintiff purports to seek relief pursuant to Business and Professions Code §§ 17200, *et seq.*, and Labor Code § 2699 on behalf of members of the general public, Frito-Lay is informed and believes and based upon such information and belief alleges that the SAC seeks the application of the law of California in a manner that would improperly delegate the executive branch's prosecutorial power to private parties in contravention of the separation of powers doctrine set forth in Article III, Section 3 of the California Constitution, and would violate the provisions of Article V of the California Constitution vesting the State's executive power in the executive branch, by authorizing private plaintiffs to purport to bring suit on behalf of the interests of the general public.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Improper Expansion of Judicial Powers)

Defendants are informed and believe and based on such information and belief allege that the SAC seeks to apply California Business and Professions Code §§ 17200, *et seq.*, and Labor Code § 2699 in a manner that would impermissibly enlarge the powers of the judiciary, in contravention of the Due Process Clause of Article I, Section 7 of the California Constitution, the separation of powers doctrine and the provisions of Article VI of the California Constitution vesting the State's judicial power in the judicial branch, and by purporting to expand the Court's jurisdiction to include the power to order Defendants to pay restitution for injuries allegedly suffered by non-parties.

1 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

2 **(Excessive Fines)**

3
4 Defendants are informed and believe, and based upon such information and
5 belief allege that any award of damages, penalties, restitution and/or disgorgement against
6 Defendants pursuant to Labor Code § 2699 and/or Business and Professions Code
7 §§ 17200, *et seq.*, would violate the Excessive Fines Clauses of the Eighth Amendment (as
8 incorporated by the Due Process Clause of the Fourteenth Amendment to the United States
9 Constitution) and Article I, Section 17 of the California Constitution.

10
11 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

12 **(Taking)**

13
14 Defendants are informed and believe and based upon such information and
15 belief allege that any award of restitution and/or disgorgement against Frito-Lay pursuant
16 to Business and Professions Code §§ 17200, *et seq.*, and/or Labor Code § 2699 would
17 constitute a taking of property without just compensation in violation of the Takings
18 Clause of the Fifth Amendment to the United States Constitution (as incorporated by the
19 Due Process Clause of the Fourteenth Amendment of the United States Constitution) and
20 Article I, Section 19 of the California Constitution.

21
22 **THIRTY-SIXTH AFFIRMATIVE DEFENSE**

23 **(Lack of Consideration)**

24
25 If there was an agreement or contract as alleged in the SAC, there was no
26 consideration for such agreement or contract, or any portion thereof, and, therefore, the
27 alleged agreement or contract is unenforceable.

1 **THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

2 **(Lack of Certainty)**

3
4 If there was an agreement or contract as alleged in the SAC, it is
5 unenforceable against Defendants for lack of certainty.

6
7 **THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

8 **(Lack of Mutuality)**

9
10 If there was an agreement or contract as alleged in the SAC, it is
11 unenforceable against Defendants for lack of mutuality.

12
13 **THIRTY-NINTH AFFIRMATIVE DEFENSE**

14 **(Excuse or Discharge)**

15
16 If there was an agreement or contract as alleged in the SAC, Defendants'
17 obligations under the contract have been excused or discharged by the Plaintiff's prior
18 breach thereof.

19
20 **FORTIETH AFFIRMATIVE DEFENSE**

21 **(Conditions Precedent)**

22
23 Defendants are informed, believe, and based thereon allege, that any
24 obligations to the Plaintiff are subject to conditions precedent which have not occurred,
25 and accordingly, Defendants are not obligated and are not in any way liable to Plaintiff,
26 whether as alleged or otherwise.

1 **FORTY-FIRST AFFIRMATIVE DEFENSE**

2 **(Commissions Calculations Lawful)**

3
4 Defendants' method of calculating commissions is lawful and does not
5 constitute an illegal chargeback of wages earned under California Labor Code section 221
6 or a violation of the Employee's Bond Law, set forth in California Labor Code sections
7 400 through 410.

8
9 **FORTY-SECOND AFFIRMATIVE DEFENSE**

10 **(Compensation System Lawful)**

11
12 Defendants' compensation system is lawful and does not constitute an illegal
13 chargeback of wages earned under California Labor Code section 221 or a violation of the
14 Employee's Bond Law, set forth in California Labor Code sections 400 through 410.

15
16 **FORTY-THIRD AFFIRMATIVE DEFENSE**

17 **(Authorization)**

18
19 Plaintiff authorized the manner in which his compensation was calculated.

20
21 **FORTY-FOURTH AFFIRMATIVE DEFENSE**

22 **(No Actual Injury)**

23
24 Plaintiff has not suffered an actual injury for which relief is available.
25
26
27
28

1 **FORTY-FIFTH AFFIRMATIVE DEFENSE**

2 **(No Knowing and Intentional Violation)**

3
4 Any violation of the California Labor Code by Defendants, which
5 Defendants expressly deny, was not a knowing and intentional violation.

6
7 **FORTY-SIXTH AFFIRMATIVE DEFENSE**

8 **(Statute of Frauds)**

9
10 Defendants are informed and believe, and thereon allege, that any purported
11 agreements which are oral or implied are subject to the statute of frauds under the
12 provisions of California Civil Code section 1624 and are thereby rendered unenforceable
13 because not evidenced by a writing.

14
15 **RESERVATION OF RIGHTS**

16
17 Defendants presently have insufficient knowledge and information upon
18 which to form a belief as to whether they may have additional, as yet unstated, affirmative
19 defenses. Defendants reserve the right to assert additional affirmative defenses in the
20 event discovery or investigation indicates such defenses would be appropriate.

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1 WHEREFORE, Defendants pray for judgment as follows:

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3 1. That Plaintiff take nothing by his SAC;

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5 2. That Defendants be awarded all of its costs and attorneys' fees incurred
6 herein; and

7
8 3. That the Court award such other and further relief as it deems just and
9 proper.

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11 Dated: October 21, 2010

12 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

13
14 By /s/ Samantha Hardy
15 GUY N. HALGREN
16 SAMANTHA D. HARDY
17 RACHEL A. MILLER

18 Attorneys for Defendants
19 FRITO-LAY, INC. and
20 ROLLING FRITO-LAY SALES, LP
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